

FCC MAIL SECTION
Before the
Federal Communications Commission
Washington, D.C. 20554
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RECEIVED BY
MM Docket No. 92-111

In re Applications of:

DEAS File No. BPH-910208MB
COMMUNICATIONS, INC.
(hereafter "Deas")

DRAGONFLY File No. BPH-910211MA
COMMUNICATIONS, INC.
(hereafter "Dragonfly")

HEALDSBURG File No. BPH-910211MB
BROADCASTING, INC.
(hereafter "HBI")

BECKWITH File No. BPH-910211MI
COMMUNICATIONS, INC.
(hereafter "Beckwith")

DESERT ROCK File No. BPH-910211ML
LIMITED PARTNERSHIP
(hereafter "Desert Rock")

HEALDSBURG EMPIRE File No. BPH-910212MM
CORPORATION
(hereafter "Empire")

R.W. COMMUNICATIONS File No. BPH-910211MJ
(hereafter "RWC") (Previously Dismissed)

For Construction Permit for a
New FM Station on Channel 240A
in Healdsburg, California

HEARING DESIGNATION ORDER

Adopted: May 7, 1992;

Released: May 20, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.¹

2. *Preliminary Matter.* On April 29, 1991, RWC filed a petition for reconsideration requesting reinstatement of its February 11, 1991 application which was returned for a

tenderability defect.² RWC failed to certify that sufficient funds were available to construct and operate the facility as described in Form 301, Instruction III and the *Report and Order* in Gen. Dkt. 88-328 ("Revision of Application for Construction Permit for Commercial Broadcast Station"), 4 FCC Rcd 3853, 3859 (1989). Specifically, RWC checked "No" in Section III, Item 1 of FCC Form 301 and stated its intention to certify financial qualification by the amendment as-of-right date. On November 27, 1991, RWC requested that its petition for reconsideration be dismissed. After a careful review of the above-mentioned pleadings, we find nothing which would warrant continuation of these matters. Accordingly, the petition for reconsideration will be dismissed.

3. *Informal Objection.* An informal objection dated May 16, 1991, was filed by Healdsburg residents John and Barbara McDonough ("the McDonoughs"). They request that the Commission reconsider the allocation of FM Channel 240A in Healdsburg, California as authorized by the *Report and Order* in MM Docket 90-228, adopted October 30, 1990, 5 FCC Rcd 7026 (1990), because they believe that construction of a new tower would be a hazard to fire-fighting aircraft. The McDonoughs further state that the area receives weak television signals which are overpowered by FM radio communications. Finally, the McDonoughs argue that "[i]f the city of Healdsburg desires a FM station, the transmitter should be in the city limits."

4. The Commission has consistently held that local land use authority, because of their location, experience and awareness of local values, are best situated to resolve land use and related aesthetic questions. *Blair Broadcasting of California Inc.*, 55 RR 2d 619 (1984). Thus, the Commission accords deference to local authorities in these matters. *Implementation of National Environmental Policy Act*, 49 FCC 2d 1313, 1329 (1974). Furthermore, all of the applicants have received clearance from the FAA. Under the Commission's Rules, the permittee "... must satisfy all complaints of blanketing interference which are received by the station during a one year period." 47 C.F.R. § 73.318. Finally, the Commission has no rule requiring that the transmitter be located within the limits of the community of license. Under 47 C.F.R. § 73.315(a), "[t]he transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, a minimum field strength of 70 dB above one uV/m (dBu), or 3.16 mV/m, will be provided over the entire principal community to be served." The McDonoughs have provided no probative evidence that any proposed tower would violate local land use ordinances and our data provides no evidence that a tower in Healdsburg would violate any of our environmental rules, 47 C.F.R. § 1.1301 *et seq.* Accordingly, we will not rescind the allocation and the informal objection will be denied.

5. *Petition to Deny.* On May 31, 1991, local resident William J. Smith ("Smith") filed a petition to deny the applications of Deas, Dragonfly and Beckwith alleging that none of these applicants have reasonable assurance of site availability.³ Specifically, Smith contends that the Sonoma

¹ Dragonfly requested dismissal of its application by letter filed March 6, 1992. However, Dragonfly has not provided the appropriate statement of no consideration required by 47 C.F.R. § 73.3525.

² On June 5, 1991, Empire filed an opposition to RWC's

petition for reconsideration.

³ Oppositions were filed by Beckwith on June 13, 1991, and by Deas and Dragonfly on June 21, 1991. Smith filed a reply to Beckwith's opposition on June 27, 1991 and replied to Dragonfly's opposition on July 2, 1991.

County Board of Zoning Adjustments will not grant these applicants permission to construct their proposed transmitting facilities because they have not made the requisite showing under the established guidelines for new tower sites in Sonoma County. Smith further supports his contentions by referring to a similar transmitter tower proposal by an unrelated broadcaster that was recently denied by the Sonoma County authorities.

6. In assessing the merits of Smith's petition to deny, a two step analysis is required. First, Section 309(d)(1) of the Communications Act, as amended, requires that the petition to deny contain allegations that, if true, are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. See 47 U.S.C. § 309 (d)(1) and (d)(2). If so, the Commission must examine all of the material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. See *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). In light of the circumstances discussed below, we conclude that the matters raised in the petition do not present a *prima facie* case or do not otherwise raise any substantial or material questions of fact that would require resolution in a hearing.

7. Where a broadcast applicant has reasonable assurance of site availability from the owner of the site, but requires zoning approval from a government entity to use that site, the applicant need not demonstrate such actual approval before the Commission grants a construction permit. *San Francisco Wireless Talking Machine Co.*, 47 RR 2d 889, 893 (1980). It appears that Deas, Dragonfly and Beckwith have reasonable assurance of site availability from the owners of the respective sites. Smith presents no clear evidence that demonstrates that the Sonoma County authorities would disapprove the necessary zoning use permit applications for construction of the proposed towers. Accordingly, Smith's petition to deny will be denied.⁴

8. *HBI*. An engineering study reveals a discrepancy in the calculation of the height above average terrain (HAAT) of HBI's proposed transmitter tower. Specifically, the HAAT as listed in Section V-B, Item (7)(b)(3) of HBI's application is 339 meters. However, the HAAT calculated by averaging the eight radials given in Section V-B, Question 19 is 169 meters. Both values fall within the maximum permitted pursuant to 47 C.F.R. § 73.211 for Class A facilities. In addition, we note that the predicted distances to the contours listed in Section V-B, Question 19 are underestimated. For example, the applicant indicates that the 60 dBu contour extends 23.1 kilometers (km)

along the 45 true north radial whereas it would actually extend 30.4 km. However, even using HBI's underestimated contour, coverage of Healdsburg would be adequate. Since neither error renders the application unacceptable for filing, HBI will be given an opportunity to submit a curative amendment.

9. Contrary to HBI's showing, the proposed operation would be in violation of the prohibited contour overlap provisions of 47 C.F.R. § 73.215 with respect to the license for KKHI-FM, San Francisco, CA on Channel 239B (file no. BLH-850128LM). HBI's proposal will cause objectionable interference based on contour overlap to the protected 54 dBu contour of the first adjacent station KKHI-FM in an arc from approximately 122° T. to 188° T. from the applicant's site. HBI appears to have used incorrect ERP/HAAT values for KKHI-FM in its calculations. Pursuant to 47 C.F.R. § 73.215(b)(2)(ii), distances to KKHI-FM's protected and interfering contours must be based on the maximum effective radiated power (ERP) and HAAT for a Class B station (50 kW at 150 meters). We acknowledge that 47 C.F.R. § 73.215(b)(2)(ii) may be somewhat unclear. Therefore, pursuant to *Rochelle C. Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985), we conclude that this discrepancy does not warrant the return of the application. Therefore, HBI will be given one opportunity to submit a minor curative amendment with the presiding Administrative Law Judge after this Order is released. If the amendment fails to cure the defects, conflicts with a previously filed application, or for any other reason is unacceptable for filing, the amendment along with HBI's original application will be dismissed. On September 25, 1991, HBI submitted an untimely engineering amendment which fails to correct the deficiencies and therefore will be returned.⁵

10. *Beckwith*. In the amendment filed by Beckwith on April 29, 1991, Beckwith checked "yes" to Section II, Question 11(a), the alien ownership or control certification. Accordingly, an appropriate issue will be specified.

11. *RF Radiation*. Dragonfly, Beckwith, Desert Rock and Empire propose to locate their transmitting antennas on new towers. In addition, HBI proposes to side-mount its antenna on the existing tower of radio station KMGG(FM). Our engineering study indicates that these applicants have failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999

⁴ On January 22, 1992, Smith filed a supplemental petition against Deas stating that the Sonoma County Grand Jury has recommended a full investigation into possible conflicts of interest on the part of M. Edgar Deas, a principal of applicant Deas, relating to his position as a member of the Healdsburg City Council. According to Smith, this information raises a character issue against Deas, and Deas should have supplemented its application under 47 C.F.R. § 1.65. Deas responded on February 12, 1992. Section 1.65(a) requires an applicant to promptly inform the Commission that "information furnished in the pending application is no longer substantially accurate and complete in all significant respects." 47 C.F.R. § 1.65(a). Deas is not required to report the grand jury's recommendations under Section 1.65 or the Commission's policy statement on character qualifications. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179,

1190-91 (1985), *reconsidered in part*, 1 FCC Rcd 421 (1986), *as modified*, 5 FCC Rcd 3252 (1990), *reconsidered in part*, 6 FCC Rcd 3448 (1991). There have been no substantial changes in Deas' pending application as there have been no *adjudications* from any court of competent jurisdiction or governmental unit. Mr. Deas has not even been *indicted* on any charges.

⁵ A study of the amendment pursuant to the requirements of 47 C.F.R. § 73.215 reveals that the tabulation for the proposed directional pattern does not agree with the sketched pattern. According to the sketch, the relative field strength at 130° T. is 0.4 while the tabulation gives a strength of 0.75 at 130° T. When 0.4 is used, there is no overlap with KKHI-FM. However, when 0.75 is used there is prohibited overlap. On October 18, 1991, Beckwith filed an opposition to HBI's petition for leave to amend. On October 30, 1991, HBI replied to Beckwith's opposition.

(April 12, 1986). See also, *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, an applicant must determine whether its proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Dragonfly, Beckwith, Desert Rock and Empire failed to specifically indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Dragonfly, HBI, Beckwith, Desert Rock, and Empire will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. See 47 C.F.R. § 1.1308(d).

12. *EEO*. The Commission requires that if there are five or more full time station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Empire has filed such a statement, it is deficient. Empire failed to list a hispanic organization. Hispanics make up 6.7% of the labor force. Accordingly, Empire will be required to file amended EEO programs with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

13. *Other Matters*. The applicants below amended their applications on the dates shown. All of the amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS

Deas
Dragonfly
HBI

AMENDMENTS FILED

February 6, 1992
June 4, 1991
January 6, 1992; April 6, 1992

14. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Beckwith is owned or controlled by aliens or their representatives, in violation of Section 310(b) of the Communications Act of 1934, as amended.
2. If a final environmental impact statement is issued with respect to HBI, Dragonfly, Beckwith, Desert Rock and Empire in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.
3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That the petition for reconsideration filed by RWC IS HEREBY DISMISSED.

18. IT IS FURTHER ORDERED, That the informal objection filed by John and Barbara McDonough IS HEREBY DENIED.

19. IT IS FURTHER ORDERED, That the petition to deny filed by William J. Smith against Deas, Dragonfly, and Beckwith IS HEREBY DENIED.

20. IT IS FURTHER ORDERED, That, in accordance with paragraphs 8 and 9 hereinabove, HBI shall submit an amendment to cure the antenna height and contour overlap deficiencies to the presiding Administrative Law Judge within 30 days after the release of this Order.

21. IT IS FURTHER ORDERED, That, in accordance with paragraph 11 hereinabove, Dragonfly, HBI, Beckwith, Desert Rock and Empire shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding

Administrative Law Judge within 30 days after the release of this Order, with a copy to the Chief, Audio Services Division.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Empire shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

23. IT IS FURTHER ORDERED, That the late amendments filed by Deas and Dragonfly ARE ACCEPTED to the extent indicated, the September 25, 1991 amendment filed by HBI IS RETURNED, and HBI's other two late amendments ARE ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau